

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in November 2014

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX

DEPARTMENT OF EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	At-Will Employment; Public Policy; Relief; Dismissal
<u>CASE STYLE:</u>	<u>Sharp, et al. v. Department of Education/Cedar Lakes Conference Center</u> DOCKET NO. 2014-1765-CONS (11/7/2014)
<u>PRIMARY ISSUES:</u>	Whether an at-will employee's grievance contesting his dismissal from employment may be dismissed for failure to allege a violation of a substantial public policy principle.
<u>SUMMARY:</u>	Grievants allege that they were improperly dismissed from their employment with the West Virginia Department of Education at the Cedar Lakes Conference Center. Grievants were dismissed from employment due to alleged lack of funding for their positions. Grievants argue that a sufficient number of employees voluntarily left employment to make up for the cut in the funding for their positions. Grievants were at-will employees. Respondent notes that, as at-will employees, Grievants may be dismissed for any reason which does not contravene some substantial public policy principle. Respondent argues that the grievances should be dismissed because there is no allegation made regarding the violation of such public policy. After being given an opportunity to do so, Grievants failed to allege that respondent violated a substantial public policy principle in terminating Grievants' employment. The consolidated grievances are DISMISSED.

KEYWORDS: Daily Rate of Pay; Teaching Experience; County Policy; Industry Experience; State Teacher Salary Schedule; Experience Credit; CTE Instructors

CASE STYLE: McKisic v. Department of Education/Division of Technical and Adult Education Services
DOCKET NO. 2013-2252-CONS (11/20/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that his daily rate of pay was not equivalent to the daily rate of pay of comparable positions in the Randolph County public schools.

SUMMARY: Grievant argued that Respondent was not properly applying the state salary schedule for teachers to him, because certain employees of the Randolph County Board of Education had been started out at a higher degree level than he, and had been credited with up to 10 years of teaching experience for industry experience, whereas he had not been credited with any years of experience until the Randolph County Board of Education adopted a written policy on this issue until September 2013. Prior to the adoption of this policy, the Randolph County Board of Education awarded industry experience credit and a higher degree level for purposes of applying the state salary schedule for teachers based on how many applications were received for a particular position. While Respondent is required by statute to pay the teachers it employs the “equivalent to the daily rate of pay of the comparable position in the public schools of the county where the institution is located,” it is not required to consider this inconsistent practice to be the daily rate of pay in the county.

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HIGHER EDUCATION EMPLOYEES

KEYWORDS: Prescription Drug Usage; At Fault Accidents; Mitigation; Properly Report Medication

CASE STYLE: Webster v. West Virginia University
DOCKET NO. 2014-1091-WVU (11/10/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that the punishment imposed was clearly excessive.

SUMMARY: Grievant's employment as a Bus Driver was terminated by Respondent after she was involved in a third at-fault accident while driving a bus within a period of one year, and for failure to properly report to Respondent's personnel that she was taking a prescription medication for pain while she was driving the bus. Respondent proved the charges against Grievant. Grievant did not demonstrate that dismissal was too severe a penalty for her actions.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Lack of Uniformity; Duty Assignments; Favoritism; Discrimination; Job Responsibilities

CASE STYLE: Lemasters, et al. v. Jackson County Board of Education

DOCKET NO. 2013-1969-CONS (11/10/2014)

PRIMARY ISSUES: Whether Grievants proved that the distribution of duties by Respondent was discrimination or favoritism.

SUMMARY: Grievants, elementary school teachers, allege a lack of uniformity in the duty assignments of teachers at their assigned school that is discrimination or favoritism. Grievants' favoritism claim fails because Grievants did not prove unfair treatment in the assignment of duties. Grievants' discrimination claim fails because Grievants are not similarly situated to itinerant teachers, and any difference of treatment is related to job responsibilities. Accordingly, the grievance is dismissed.

KEYWORDS: Paid Vacation; Additional Compensation; Policy; Employment Term

CASE STYLE: Harlow v. Upshur County Board of Education

DOCKET NO. 2014-0734-CONS (11/7/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that the paid vacation policy was erroneous by the Respondent.

SUMMARY: Grievant was employed by the Respondent as an Assistant Principal at the time she filed this grievance. Grievant complains that she was not paid vacation days to which she alleged she was entitled pursuant to policy. Grievant was not required to work more than the number of days for which she was contracted by Respondent. Grievant was never required to report to work more than 220 days and was paid for 225 days, her contracted annual term of employment. The policy in question has been interpreted to mean that when out-of-school environmental days were not used for making up report to work on snow days, those days were treated like vacation days, in that they were included in the days worked as a contracted and paid day, but the principal was not required to report to work. Grievant was unable to demonstrate that this interpretation was clearly erroneous by the Respondent. This grievance is denied.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Vacancy; Selection; Hiring Process; Next in Line; Arbitrary and Capricious

CASE STYLE: Nottingham v. Kanawha County Board of Education
DOCKET NO. 2014-0382-KanED (11/25/2014)

PRIMARY ISSUES: Whether Respondent's selection process was arbitrary and capricious.

SUMMARY: Grievant, the remaining most senior candidate after the most senior candidate declined the position, was not selected for a Supervisor of Maintenance position. Selection of service personnel must be made based on seniority, qualifications and evaluation of past service. Respondent's selection process did not give adequate consideration to seniority, evaluation of past service, or objective measures of qualifications. Grievant proved the selection process was arbitrary and capricious, but the selection process did not allow for an adequate comparison of the candidates such that Grievant can now be instated into the position. The proper remedy under the facts of this case is to order the position be reposted. Accordingly, the grievance is granted in part and denied in part.

KEYWORDS: Remand Order; Classification; Work Schedule; Contract

CASE STYLE: Sayre v. Mason County Board of Education

DOCKET NO. 2012-0140-CONS(R) (11/14/2014)

PRIMARY ISSUES: Whether Grievant was treated as a 7-hour employee or an 8-hour employee.

SUMMARY: Upon remand from Circuit Court, the evidence established that the Board of Education awarded Grievant an increase in her contract from 220 days to 261 days without any notice that a change in her working hours from a 7-hour day to an 8-hour day would result. When Grievant began working an 8-hour day at the beginning of the 2011-2012 school year, both she and her supervisor understood that this change was in accordance with a policy change requiring all school service employees to work 8-hour days. Grievant and several other employees filed a grievance challenging that change which was granted at Level III, appealed to Circuit Court, and affirmed. Grievant's work schedule was restored to a 7-hour work day in May 2013, and she continued to work a 7-hour day until the beginning of the 2013-2014 school year, when all employees voluntarily consented to change their work schedules. In these circumstances, Grievant is entitled to back pay on the same basis as all other prevailing grievants in the consolidated Nott matter.

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STATE EMPLOYEES

KEYWORDS: Probationary Employee; Unsatisfactory Performance; Failure to Meet Expectations; Harassment

CASE STYLE: Bailey v. Kanawha-Charleston Health Department

DOCKET NO. 2014-1481-KanCH (11/26/2014)

PRIMARY ISSUES: Whether Grievant proved that her performance met Respondent's required level of performance or prove that Respondent's required level of performance was unreasonable.

SUMMARY: Grievant was employed by the KCHD in a probationary capacity as a Sanitarian 1. Respondent KCHD determined that Grievant's performance as a probationary employee was not satisfactory, and they dismissed her from employment before her probationary period expired. In such instances the probationary employee has the burden of proving that their employment was satisfactory. While Grievant is obviously intelligent and capable, there were enough problems with her performance to justify Respondent dismissing her probationary employment. Additionally, Grievant argues that she was subjected to prohibited nondiscriminatory workplace harassment. It was clear from the evidence that the relationship between Grievant and her supervisors was strained, but there was not sufficient evidence to demonstrate that the supervisors were guilty of workplace harassment.

KEYWORDS: Selection; Most Qualified Applicant; Arbitrary and Capricious

CASE STYLE: Bunting, Jr. v. Division of Corrections/Northern Correctional Center and Kari A. Maury, Intervenor

DOCKET NO. 2014-0469-MAPS (11/26/2014)

PRIMARY ISSUES: Whether Respondent's determination that Grievant was not the most qualified applicant for the position was arbitrary or capricious, or clearly wrong.

SUMMARY: This grievance was filed when Grievant was not selected for a posted Corrections Case Manager position. Grievant made many allegations, but did not demonstrate a flaw in the selection process or that he should have been selected for the position.

KEYWORDS: Classification; Job Duties; Class Specification; Reallocation; Arbitrary and Capricious

CASE STYLE: Hicks v. Department of Health and Human Resources/Bureau for Children and Families and Division of Personnel

DOCKET NO. 2014-0631-DHHR (11/18/2014)

PRIMARY ISSUES: Whether Grievant's duties fall more closely within the Administrative Services Assistant II classification.

SUMMARY: Grievant asserts that she should be reallocated to the position of Administrative Services Assistant II due to a significant change in Grievant's duties and responsibilities within the agency. The Division of Personnel maintained that Grievant's work does not match the same type of duties as performed by an Administrative Services Assistant II. The Division of Personnel determined that an Administrative Services Assistant I is the best fit for Grievant. Record established that Grievant's primary duties relating to her employment had remained the same since she was first employed with the Department of Health and Human Resources in 2011. The record also established that the Division of Personnel classifies a position based on the predominant duties of the job. Grievant failed to meet her burden of proof and demonstrate that her duties fell more closely within the Administrative Services Assistant II than the Administrative Services Assistant I classification during the eight month period in question. This grievance is denied.

KEYWORDS: Functional Demotion; Demotion; Job Title; Job Duties; Responsibilities; Arbitrary and Capricious

CASE STYLE: Ratcliff v. Department of Environmental Protection/Division of Mining and Reclamation

DOCKET NO. 2010-1211-DEP (11/24/2014)

PRIMARY ISSUES: Whether Grievant proved by a preponderance of the evidence that he was functionally demoted, or that Respondent's actions were arbitrary and capricious.

SUMMARY: Grievant alleges that he was functionally demoted as a result of changes that his supervisor has made to the organizational structure of his agency. Grievant further alleges that the changes implemented by management were arbitrary and capricious, have diminished his duties, and interfered with his ability to manage his program. Respondent denies Grievant's claims, arguing that Grievant has not been functionally demoted and that all changes implemented by Grievant's supervisor have been proper and within his discretion. Grievant failed to meet his burden of proving his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Overtime; Unscheduled; Emergency; Discretion; Favoritism

CASE STYLE: Cobb, et al. v. Division of Highways

DOCKET NO. 2013-2140-CONS (11/25/2014)

PRIMARY ISSUES: Whether Grievants proved that DOH violated its overtime policy.

SUMMARY: Grievants are permanent, full-time employees of Respondent DOH, and are classified as Transportation Worker 2-Equipment Operators. Following a traffic incident on June 13, 2013, a DOH Crew Leader was notified that employees needed called out to remove debris from a roadway. Such would have been overtime for the employees assigned to do this work. The Crew Leader who was called was just filling in for the regular Crew Leader, and he had not been in that position very long. He did not have any kind of call-out list or employee phone directory. As such, the Crew Leader called three DOH employees whose telephone numbers he just happened to have saved to his personal cell phone. The Crew Leader called those people and assigned them the overtime. Only one of the people he called was a member of his crew, and she was a temporary employee. Another of the three was the Storekeeper. The third person was a Transportation Worker 2. Grievants assert that the assignment of overtime to those three employees violates the DOH Overtime Policy and allege favoritism. Respondent denies Grievants' claims, arguing that as the overtime at issue was unscheduled, emergency overtime, the supervisor was allowed by policy to use his discretion in assigning the overtime. Grievants failed to prove their claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Motion to Dismiss; Relief ; Remedy; Failure to State a Claim; Affirmative Defense

CASE STYLE: Blair v. Department of Veterans Assistance

DOCKET NO. 2014-1589-CONS (11/6/2014)

PRIMARY ISSUES: Whether the remedy which Grievant seeks in her grievance is available to her through the West Virginia Public Employees Grievance Procedure.

SUMMARY: The only remedy Grievant seeks is either Ms. Botante or Ms. Kisamore be suspended or that Ms. Kisamore be demoted from her position as assistant Director of Nursing. The Grievance Board has decided on several occasions that this remedy is not within the Board's statutory authority to grant. Accordingly, the grievance is DISMISSED.

KEYWORDS: Overtime; Similarly-Situated Employees; Discrimination; Arbitrary and Capricious

CASE STYLE: Goff v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2012-1487-DHHR (11/3/2014)

PRIMARY ISSUES: Whether Grievant proved that Respondent's decision to mandate her to work overtime was discriminatory or arbitrary and capricious.

SUMMARY: Grievant is employed as a Licensed Practical Nurse at the William R. Sharpe, Jr. Hospital. Grievant alleges that she was unfairly required to work overtime and that Sharpe Hospital's mandatory overtime practices are discriminatory. Respondent asserts that its mandatory overtime practices are not discriminatory, and are not applied in an arbitrary and capricious manner. Grievant, under the limited facts of this case, did not meet her burden of proof by demonstrating that Respondent's overtime practices were discriminatory or arbitrary and capricious. This grievance is denied.

KEYWORDS: Denial of Meeting Union Representative; Policy; Untimeliness; Statutory Time Lines

CASE STYLE: Powers, et al. v. Division of Highways

DOCKET NO. 2014-0129-CONS (11/12/2014)

PRIMARY ISSUES: Whether Grievants proved that Respondent violated its policies as to employee access to policy and procedure manuals.

SUMMARY: Grievants assert that they were not allowed to meet with union officials during work hours and that they did not have access to manuals addressing the issue. The lower level ruling that the complaints regarding access to union representatives are dismissed as untimely is upheld. In addition, the ruling that Grievants did not provide any evidence to support their claim that a policy violation occurred or that they are being denied access to work manuals is also upheld. Accordingly, this grievance is denied.

KEYWORDS: Derogatory Racial Terms; Termination; Progressive Discipline; Mitigation; Offensive and Inappropriate Language; Unprofessional Conduct

CASE STYLE: Elliott v. Division of Corrections/Beckley Correctional Center

DOCKET NO. 2014-0181-MAPS (11/14/2014)

PRIMARY ISSUES: Whether Respondent established that Grievant was terminated for good cause; specifically, for using inappropriate and offensive, and racially charged language in the workplace in violation of Respondent's policies.

SUMMARY: Grievant was terminated for unprofessional conduct and use of inappropriate and offensive language in the workplace. Her termination followed a Third-Party Complaint Equal Employment Opportunity investigation, which substantiated that Grievant used inappropriate language in the workplace that reflected a pattern of inappropriate and pervasive racial remarks. Respondent established that Grievant failed to conduct herself professionally with co-workers and inmates in clear violation of various policies and procedures of the West Virginia Division of Corrections. Grievant failed to demonstrate that the disciplinary action taken against her by Respondent was improper, that termination was too severe a punishment or that mitigation was warranted under these circumstances. Accordingly, the grievance is DENIED.

KEYWORDS: Dismissal; Timeliness

CASE STYLE: Parsons v. General Services Division

DOCKET NO. 2014-1539-DOA (11/14/2014)

PRIMARY ISSUES: Whether Grievant timely filed his grievance.

SUMMARY: Grievant filed his grievance within fifteen days after receiving his docked paycheck, but not within fifteen days of being informed that his paycheck was going to be docked. Grievant contends that his filing was timely. Respondent asserts that the grievance was untimely filed as it was filed more than fifteen days after the Grievant had been notified that his pay would be docked in a written reprimand, and, as such, has moved to dismiss this grievance. For the reasons more fully set out below, Respondent's Motion to Dismiss is granted.